IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33823

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 575**
	)	
Plaintiff-Respondent,	)	**Filed: August 1, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
DENNIS L. NIELSON,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael R. McLaughlin, District Judge.

Judgment of conviction and sentence for lewd conduct with a minor under sixteen, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Ann Wilkinson, Deputy Attorney General, Boise, for respondent.

SCHWARTZMAN, Judge Pro Tem

Dennis L. Nielson appeals from his conviction by jury for lewd conduct with a minor under sixteen, Idaho Code § 18-1508, specifically for manual-genital conduct with a seven-year-old female child. He contends that the district court erred by not adequately inquiring into his competency in granting his motion to represent himself *pro se*, by denying his motion for a continuance of the trial, by ordering that his prison mental health records be sent to his standby counsel rather than himself personally, by denying his presentencing motions for an updated presentence investigative report and for a psychosexual evaluation, and by imposing an excessive sentence. We affirm.

A. Nielson's Motions Regarding His *Pro Se* Status

We first address Nielson's claims of error attendant to his *pro se* status. Because Nielson was indigent, the district court appointed a public defender to represent him. Trial was set to

commence on November 13, 2006. On October 27, 2006, at a pretrial conference, with Nielson present, defense counsel informed the court that Nielson was dissatisfied with his preparation for trial and that Nielson wanted either a different attorney or leave to represent himself *pro se*. The district court inquired into the matter and determined that Nielson's counsel had requested, received, and reviewed all pertinent discovery materials from the state, had contacted and spoken to potential witnesses and made strategic decisions regarding who to call as a witness at trial, had discussed the evidence and witness concerns with Nielson, that no further pretrial motions were anticipated or necessary, and that defense counsel was fully prepared to represent Nielson at the upcoming trial. Accordingly, the district court denied Nielson's request for a different attorney and the inquiry turned to Nielson's alternative request to proceed *pro se*.

At the hearing, evidence was presented that Nielson had mental health issues and had recently been released from the psychiatric unit at the penitentiary. The district court, however, determined that from its discussions with the defendant at the hearing and the representations of defense counsel,[1] Nielson was lucid, articulate, understood the proceedings and was competent to act as his own attorney.[2] After warning Nielson of the dangers and pitfalls of self-representation, the district court granted Nielson's motion to proceed *pro se* but appointed the public defender as *standby* counsel to assist Nielson in his defense. Furthermore, in an exercise of caution, the district court ordered standby counsel to review Nielson's psychiatric records from the penitentiary and report back to the court if those records revealed any further concerns regarding Nielson's ability to represent himself. On November 1, the district court entered an order directing the Department of Correction to release the psychiatric records directly to standby counsel.

On November 13, the first day set for trial, Nielson moved for a continuance. The basis for the motion was Nielson's oral representation that on November 8 he had been diagnosed by a

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[1] The district court asked defense counsel whether, regarding Nielson's mental health, counsel had observed Nielson have any difficulty in understanding and participating in rational and in-depth conversations. Defense counsel responded: "No, your Honor. There is no question in my mind [Nielson] is competent to proceed today."

[2] We note that the United States Supreme Court has recently recognized a distinction between being mentally competent to stand trial and being mentally competent to act as one's own attorney. *See Indiana v. Edwards*, ___ U.S. ___, 128 S.Ct. 2379 (2008).

prison psychiatrist as schizophrenic. The district court denied the motion because Nielson had no documentation of this diagnosis. Nielson then requested to have his standby defense counsel re-appointed as his trial attorney. The district court granted the motion and defense counsel conducted the defense in all respects, at trial and through sentencing.

On appeal, Nielson contends that the district court erred by not adequately inquiring into his competency in granting his motion to represent himself *pro se*, by denying his motion for a continuance of the trial, and by ordering that his mental health records be sent to his standby counsel rather than to himself personally. The State responds, among other things, that even if error is assumed, because of ensuing circumstances Nielson has shown no prejudice. We agree.

Under the harmless error rule applicable in criminal proceedings, "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Idaho Criminal Rule 52; *State v. Montoya*, 140 Idaho 160, 166, 90 P.3d 910, 916 (Ct. App. 2004). In this appeal, Nielson has identified no prejudice attendant to his self-representation over the eighteen days he represented himself (from October 27 through the morning of November 13) during which time he also had the assistance of standby counsel. Therefore, Nielson's claim that the district court erred by not adequately inquiring into his competency in granting his motion to represent himself *pro se* is without merit. In this same vein, Nielson's claims that the district court erred by not adequately inquiring into his motion for a continuance of the trial and by ordering that his mental health records be sent to his standby counsel rather than to himself personally also fail for a lack of a showing of prejudice.[3] Nielson has failed to establish reversible error.

B. Requests for an Updated PSI and a Psychosexual Evaluation

Nielson next asserts that the district court erred by denying his motion for an updated presentence investigation report ("PSI") prior to sentencing. We find no error.

Idaho Criminal Rule 32(a) provides:

> The trial judge need not require a presentence investigation report in every criminal case. The ordering of such a report is within the discretion of the court. With respect to felony convictions, if the trial court does not require a presentence investigation and report, the record must show affirmatively why such an investigation was not ordered.

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[3] Nielson's IDOC mental health records do not support his claim of current psychotic symptoms.

At the close of trial, the district court stated that it was not ordering that a PSI be prepared for sentencing because a PSI on Nielson had recently been prepared in another case.[4] Nielson moved to reconsider. At a hearing, Nielson asserted that he was psychologically compromised because he was not on proper medication at the time of the preparation of the existing PSI and that he would now, being properly medicated, be in a better "mental frame" and more cooperative with the PSI investigator. The district court declined to change its ruling.

On appeal, Nielson repeats the assertions that he made to the district court, further asserts that he could have provided unspecified "useful information" to a new PSI investigator, and concludes therefrom that the district court abused its discretion. We disagree. Review of the PSI that was used shows that the investigator found Nielson "polite and appropriate," and there exists no indication that he was uncooperative. At sentencing, Nielson voiced no concerns about the content of the PSI and he offered no corrections or additions to it. More importantly, if Nielson had "useful information" that he wished to personally convey to the district court for sentencing purposes, there was no need for him to do so through the conduit of an updated PSI. At sentencing, Nielson was afforded his right of allocution to the court, but he declined to say anything. Nielson has failed to show an abuse of discretion in the district court's decision not to order the preparation of a new PSI.

Nielson also claims that the district court erred by denying his motion for a psychosexual evaluation prior to sentencing. He argues that he could have provided unspecified "useful information" to a psychosexual evaluator, and concludes therefrom that the district court abused its discretion. We again disagree.

A trial court's decision whether to order a psychosexual evaluation upon a conviction for a sexual offense is discretionary. *See* I.C. § 18-8316 ("If ordered by the court . . . ."). The primary concerns addressed by a psychosexual evaluation prepared for sentencing purposes are a defendant's future dangerousness and risk of reoffense. *See generally Estrada v. State*, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006); *State v. Scovell*, 136 Idaho 587, 594, 38 P.3d 625, 632 (Ct. App. 2001); *State v. Starchman*, 136 Idaho 424, 426, 34 P.3d 1107, 1109 (Ct. App. 2001). Here, the district court determined that a psychosexual evaluation was unnecessary because this

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[4] The district court utilized the PSI prepared approximately nine months earlier on Nielson's sentencing for failure to register as a sex offender. Use of a previously prepared PSI is generally permissible. *State v. Hyde*, 127 Idaho 140, 150, 898 P.2d 71, 81 (Ct. App. 1995).

was Nielson's third Idaho conviction for lewd conduct with a minor, thus establishing his future dangerousness and risk to reoffend. We agree with the district court's reasoning and find no abuse of discretion.

C. Sentence

Finally, Nielson asserts that his unified sentence of fifty years, with thirty years fixed, is excessive. The standards are well established. Sentencing is discretionary and an abuse of discretion will be found only if, in light of the governing criteria, the sentence is excessive under any reasonable view of the facts. *State v. Charboneau*, 124 Idaho 497, 500, 861 P.2d 67, 70 (1993); *State v. Kerchusky*, 138 Idaho 671, 679, 67 P.3d 1283, 1291 (Ct. App. 2003). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726-27, 170 P.3d 387, 391-92 (2007). Where reasonable minds might differ as to the length of the sentence, this Court will not substitute its view for that of the district court. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992); *Kerchusky*, 138 Idaho at 679, 67 P.3d at 1291; *State v. Admyers*, 122 Idaho 107, 108, 831 P.2d 949, 950 (Ct. App. 1992). The primary objectives of a sentence of confinement are to protect society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

In 1984, Nielson was convicted, in Cassia County, of lewd conduct with a minor for molesting his six-year-old niece. In 1985, also in Cassia County, he was charged with four additional counts of lewd conduct with a young female child and pleaded guilty to two of these counts. He received concurrent sentences on the three convictions, the longest of which was an indeterminate term of eighteen years, was sent to the penitentiary and was eventually paroled. In 1996, Nielson was charged, in Boise County, with second degree kidnapping for detaining a seven-year-old female child in a hotel after the child was reported missing. He pleaded guilty to a reduced felony charge of injury to a child and was sentenced to a unified term of incarceration of ten years, with five years fixed. Nielson again was sent to the penitentiary until he was paroled in 2001. In the instant case, Nielson was convicted for molesting, by manual-genital conduct, a seven-year-old female child, who had reported four or five instances of molestation. Nielson committed the instant offense approximately one year after he was paroled and when he was confronted with the child's allegations, he absconded supervision until two years later when he was located and arrested in Oregon on a warrant. Other allegations of Nielson's molestation

of young female children also appear in the record. Approximately one year before the sentencing in this case, Nielson was convicted of the felony charge of failure to register as a sex offender. Nielson has also been convicted of the felony offenses of grand theft and forgery.

Nielson argues that his sentence is excessive because he has some good qualities. While this may be so, at some point protection of society becomes the paramount concern at sentencing. Nielson's record clearly shows that he is a pedophile, a repeat offender, and a danger to children. Previous lesser terms of incarceration at the penitentiary have not served to deter him. The district court's sentence, which is admittedly harsh, was properly imposed.

Nielson has shown no reversible error regarding rulings attendant to his *pro se* status. The district court did not err in denying motions for an updated presentence investigative report and for a psychosexual evaluation. The district court did not impose an excessive sentence. The judgment of conviction and sentence are affirmed.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**